SUPREME COURT OF THE UNITED STATES.

No. ~~204~~. 197/104-101

MARY CURTIS, ADMINISTRATRIX OF EDWARD CURTIS, DECEASED, PLAINTIFF IN ERROR,

vs.

ERNEST FIEDLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

G. S. GIDEON, Printer, 511 Ninth street, Washington, D. C.

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Judge Davis

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Gideon, Print.

[L. S.] UNITED STATES OF AMERICA.

The President of the United States of America to the Judges of the Circuit Court of the United States for the southern district of New York, in the second circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Ernest Fiedler, plaintiff, and Mary Curtis, administratrix, &c., of Edward Curtis, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said, and as appears by their complaint of the said defendant: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid, on the first day of January next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this fifteenth day of December, in the year of our Lord one thousand eight hundred sixty, and of the independence of the United States the eighty-fifth.

KENNETH G. WHITE, *Clerk.*

The answer of the Judges of the Circuit Court of the United States for the southern district of New York, in the second circuit, in the within writ mentioned.

The record and proceedings whereof mention is within made, and all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned in a certain schedule to the writ annexed, as within it is commanded.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this seventeenth day of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

[L. S.]

KENNETH G. WHITE, *Clerk.*

By the Honorable Samuel R. Betts, one of the Judges of the Circuit Court of the United States for the Southern district of New York, in the second circuit, to the Marshal of the United States for the Southern district of New York:

Whereas Mary Curtis, administratrix, &c., lately issued out of the Supreme Court of the United States a writ of error, directed to the judges of the circuit court of the United States for the southern district of New York, in the second circuit, stating that, in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judges thereof, between Ernest Fiedler, plaintiff, and the said Mary Curtis, administratrix, &c., a manifest error hath happened, to the great damage of the said defendant; and whereas for the correction of that error in due manner, the said writ has been issued returnable at the next stated Supreme Court of the United States, held at the city of Washington, on the first day of January next, the said plaintiff is therefore cited to appear before the said Supreme Court, of the city of Washington, on the said first day of January next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the seventeenth day of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

SAM'L R. BETTS.

I hereby admit due service of the within citation, and waive all objections as to the time of the return thereon.

New York, December 17, 1860.

JOHN P. CROSBY,
*Attorney for Plaintiff.*

U. S. Circuit Court.

Pleas before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, at the City Hall, in the city of New York, in the said southern district of New York, of October term, in the year of our Lord one thousand eight hundred and forty-seven.

Witness Roger B. Taney, esq., Chief Justice of the Supreme Court of the United States.

ALEXANDER GARDINER, *Clerk*.

Southern District of New York, *ss*.

Be it remembered, that heretofore, to wit, on the first day of January, in the year one thousand eight hundred and forty-seven, the President of the United States of America sent his writ close of certiorari in the superior court of the city of New York, to cer-

tify to the court certain pleadings and proceedings then remaining of record in said Supreme Court, in a certain cause wherein Ernest Fiedler is plaintiff and Edward Curtis is defendant, for that the said Edward Curtis was sued therein for acts done by him as collector of the customs of the port of New York, which pleadings and proceedings, on the first day of February, in the year 1847, were returned to us in the words and figures following, to wit:

CITY AND COUNTY OF NEW YORK, *ss.*

Ernest Fiedler, plaintiff in this suit, by E. H. Owen, his attorney, complains of Edward Curtis, defendant in this suit, being in custody, &c., of a plea of trespass on the case upon promises:

For that whereas the said defendant, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and forty-seven, at New York, to wit, at the city and county of New York, to wit, at the city and county aforesaid, and within the jurisdiction of this court, was indebted to the said plaintiff in the sum of four thousand dollars of lawful money of the United States of America, for divers goods, wares and merchandises, by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had, before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares and merchandises of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares and merchandises, at the time of the sale and delivery thereof, were reasonably worth, when the said defendant should be thereunto afterwards requested, and the said plaintiff avers that the said goods, wares and merchandises last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of four thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant. And for other money by the said plaintiff, before that time, paid, laid out and expended for the said defendant, and at the like request of the said defendant, and for other money by the said defendant before that time had and received, to and for the use of the said

plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, and when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of four thousand dollars of like lawful money as aforesaid; and being so found in arrear, and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof, the said *said* defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of four thousand dollars, and therefore the said plaintiff brings suit, &c.

And now, at this day—that is to say, on the first Monday of December, of December term, in the year one thousand eight hundred and forty-seven, until which day the said defendant had leave to the bill aforesaid to imparle, and then to answer thereunto, &c., before the justices of the said court, at the City Hall, in the city of New York—come as well *as* the plaintiff aforesaid, by his attorney aforesaid, as the said defendant, by Thomas G. Talcott, his attorney.

And the said defendant defends the wrong and injury, when, &c., and says that he did not promise and undertake in manner and form as the said plaintiff hath above thereof complained against him, and thereof he puts himself on his country, and the said plaintiff likewise, &c.

Wherefore the issue aforesaid, between the parties aforesaid, in form aforesaid joined, is ordered by the said court before the aforesaid justices thereof, now here to be tried at a term of the said court, appointed to be held at the City Hall, in the city of New York, on the first Monday of April, 1859.

Afterwards—that is to say, on the first day of May, of the term of April, 1849, aforesaid, before the Honorable Samuel Nelson, one

of the justices of the said circuit court—come the parties aforesaid, by their respective attorneys aforesaid, and the jurors aforesaid, whereof mention is within made, being summoned, also come, and the jurors of that jury being chosen, tried, and sworn, say upon their oaths, that the said defendant did undertake and promise, in manner and form as the said plaintiff hath above alleged and complained against him, and they assess the damages of said plaintiff by reason of the premises over and above the costs and charges by him about this suit in this behoof expended, at fourteen hundred and fifteen dollars and sixty-three cents, and for those costs and charges six cents.

And because said circuit court are not yet advised what judgment to give of and upon the premises, therefore the process thereof is continued between the parties aforesaid in the same court, before the justices thereof, until the first Monday of October, in the year 1860, and the same day is given to the parties aforesaid, at the same place, to hear the judgment of the said court thereupon. At which last mentioned day, before the said justices come, as well the said plaintiff, by his attorney aforesaid, as the attorney for the said defendant, and hereupon the said plaintiff suggests to the court now here, and gives the court to understand and be informed that after the finding of the verdict aforesaid, and before this day, the said defendant, Edward Curtis, died intestate, and that his widow, Mary Curtis, is the duly qualified administratrix of the goods, chattels, and credits which were of the said Edward Curtis, deceased, and that the said Mary Curtis, as such administratrix, has, by an order of the said court, been duly substituted as defendant in the place of the said Edward Curtis, without prejudice to any of the proceedings already had in this cause.

Whereupon the said plaintiff prays judgment against the said Mary Curtis, as administratrix of and upon the premises.

Therefore it is considered that the said plaintiff do recover against the said defendant, Mary Curtis, administratrix of the goods, chattels, and credits of Edward Curtis, deceased, by said damage, costs, and charges, by the jurors aforesaid, in form aforesaid assessed, and also twelve hundred and fifty-three dollars and ninety-four cents for interest on the said verdict, and for the costs and *and* charges of the said plaintiff by the said court now here adjudged of increase to the said plaintiff, and with his assent, which said damages, interest, costs, and charges in the whole amount to the sum of twenty-six hundred and sixty-nine dollars and fifty-seven costs, ($2,669 57.)

And the said defendant in mercy, &c.

Judgment signed this seventeenth day of December, 1860.

R. E. STILWELL,
*Deputy Clerk.*

United States Circuit Court, Southern district of New York.

EDWARD CURTIS
ads.
ERNEST FIEDLER.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Be it remembered, that at a circuit court of the United States, for the southern district of New York, held at the City Hall, in the city of New York, in the said southern district of New York, on the first day of May, in the year one thousand eight hundred and forty-nine, before the Honorable Samuel Nelson, associate justice, the issue within contained, between the said Ernest Fiedler, plaintiff, and the said Edward Curtis, defendant, came on
2 to be tried, and the said parties, by their respective attorneys, before the said judge came, and the jurors of the jury in this behalf duly sommoned also came, and were then and there in due manner chosen and sworn to try the said issue; and the counsel for the said plaintiff, to maintain and prove the said issue on his part, produced and gave in evidence an original entry, made at the custom-house in the port of New York by the said
3 plaintiff, on the first day of September, one thousand eight hundred and forty-two, of goods and merchandise imported into said port of New York, in and by the Russian ship Nicolay Savin, from St. Petersburg, in Russia, and which said goods and merchandise were consigned by Stephen Savin, the owner thereof, to the said plaintiff. The said entry was in the words and figures following, that is to say:

*Entry of Merchandise, imported by Ernest Fiedler, in the Nicolay Savin, whereof Holstein is master, from St. Petersburg. New York, Sep. 1st, 1842.*

| Marks. | Nos. | Packages and Contents. | | | Total. |
|---|---|---|---|---|---|
| P. S. J. | ..... | Eighteen hundred and thirty-five bars iron, hammered, 3,150 poods ..... | S. R. 4,050 | | I hereby protest against the payment of the duty charged in this entry, on account that there exists no law authorizing the exaction of said duty. |
| | | Charges ..... | 311 | | |
| E. F. | 1—50 | Fifty bundles hemp, 3,120 poods, 25 ..... | | 8,024 46 | |
| | | Charges ..... | | 1,092 76 | |
| [S. S.] | 1—15 | Fifteen bundles hemp, 944 poods, 5 a..... | | 2,535 65 | |
| | | Charges ..... | | 334 39 | |
| | | | S. R. 4,361 | 11,987 26 | $12,046 00. |
| | | Freight for the hemp, fifteen dollars per ton. | | | |
| | | Do. for the iron, nine dollars per ton. | | | Arnel, Sep. 1st, 1842. |
| | | $3,500. | | | ERNEST FIEDLER. |
| | | 6 Sep. | | | |
| | | W. D. R. | | | |

*Curtis vs. Fiedler.*

7

The affidavit of said plaintiff, connected with and accompanying said entry, was in the words and figures following, that is to say:

DISTRICT AND PORT OF NEW YORK.

Consignee, Importer, or Agent's Oath.

I, Ernest Fiedler, do solemnly and truly swear that the invoice and bill of lading now presented by me to the collector of New York, are the true and only invoice and bill of lading by me received, of all the goods, wares and merchandise imported in
6 the Nicolay Savin, whereof Holstein is master, from St. Petersburg, for account of any person whomsoever, for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know nor believe in the existence of any other invoice or bill of lading of the said goods, wares and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares and merchandise, according to the said invoice and bill of lading; that nothing has been,
7 on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; and that if at any time hereafter I discover any error in the said invoice, or in the account now rendered of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly
8 and truly swear that to the best of my knowledge and belief, Stephen Savin is owner of the goods, wares and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits the actual cost or fair market value at St. Petersburg of the said goods, wares and merchandise, all the charges thereon, and no other or different discounts, bounty or drawback, but such as has been actually allowed on the same.

ERNEST FIEDLER.

9 Sworn this 5th day of Sept'r, 1842, before me.

JAS. T. TALMAGE,
*D. Collector.*

N. J. ELLIOTT,
*Naval Officer.*

Owner's Oath.

I, Ernest Fiedler, do solemnly and truly swear, that the entry now delivered by me to the collector of New York contains a just and true account of all the goods, wares, and merchandise imported by, or consigned to me, in the Nicolay Savin, whereof Holstein is master, from St. Petersburg; that the invoice which I now produce

contains a just and faithful account of the actual cost of the
10 said goods, wares and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dying, dressing, finishing, putting up and packing, and no other discount, drawback or bounty, but such as has been actually allowed on the same; that I do not know nor believe in the existence of any invoice or bill of lading than those now produced by me, and that they are in the state in which I actually received them. And I do further solemnly and truly swear that I have not in the said entry or invoice concealed or suppressed anything whereby the United
11 States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; and that if at any time hereafter I discover any error in the said invoice, or in the account now produced of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district.

E. FIEDLER.

Sworn this 5th day of Sept'r, 1842, before me.

JAS. T. TALMAGE,
*D. Collector.*

N. J. ELLIOTT,
*Naval Officer.*

12 It was admitted by the counsel for the parties, respectively, that the defendant was then collector of the customs of the port of New York; and that, as such collector, pursuant to the decision and instructions of the Treasury Department, the said defendant charged on the unmanufactured hemp included in said entry a duty of forty dollars per ton, under the third subdivision of the third section of the act of the 30th of August, 1842, "to provide revenue from imports, and to change and modify
13 existing laws imposing duties on imports, and for other purposes," which duties amounted on the said hemp to the sum of $2,575 38; and also that, as such collector, the said defendant charged on the iron included in said entry duties to the amount of $848 56, under and by virtue of the fourth section of the said act; all which said duties amounted, in the aggregate, to the sum of $3,423 94; against the payment of which the
14 said plaintiff protested, in writing, in the words and figures following, the same being written in the margin of the aforesaid original entry:

"I hereby protest against the payment of the duty charged in this entry, on account that there exists no law authorizing the exaction of said duty.

E. FIEDLER."

Sept'r 1st, 1842.

But the whole of the said sum of $3,423 94 was, notwithstanding the said protest, exacted by the said defendant as such
15 collector, and under the said protest paid by the said plaintiff on the 6th of September, 1842, to the defendant, and by him paid into the Treasury of the United States. It was further admitted, that if the hemp included in the said entry was legally chargeable at the time of the importation thereof with a duty of only twenty-five dollars per ton, then there was exacted by the said defendant an excess of duty thereon to the amount of $965 77. And the counsel for the said plaintiff did then and there insist that, under and by virtue of the sixth and eleventh articles of the treaty made and concluded between the United
16 States and the Emperor of all the Russias on the sixth (eighteenth) day of December, 1832, the said hemp in said entry described could only be charged with a duty of twenty-five dollars per ton, inasmuch as by the same third subdivision of the third section of the aforesaid act of the 30th of August, 1842, which imposes on "unmanufactured hemp" a duty of forty dollars per ton, there is laid on "Manilla, Sunn, and other hemps of India," a duty of only twenty-five dollars per ton; and thereupon the said counsel insisted that the exaction by the said defend-
17 ant of any amount for duty on the said hemp beyond the rate of twenty-five dollars per ton was unauthorized and illegal, and that the said plaintiff was therefore entitled to recover in this suit from the said defendant the said sum of $965 77, being the excess over the rate of twenty-five dollars per ton, so as aforesaid exacted by said defendant, and paid by said plaintiff for duties on the said hemp, together with interest thereon at seven per centum, according to the law of the State of New York.

18 And the said plaintiff, further to maintain the said issue on his part, called as a witness Stephen Whittemore, junior, of Salem, Massachusetts, who testified that he was engaged in the manufacture of cordage at Salem, and had been so engaged for the last twenty-six years. Witness purchases hemp, and manufactures it into cordage for ships' use. We buy for this purpose, Russian, Manilla, Bombay, Sisal, and some Italian and American hemp. Several samples of different kinds of hemp being produced and shown to him, he identified them as follows:

19 Sample marked A is Sunn hemp from India.
Sample marked B is Bombay hemp.
Sample marked C is Italian hemp.
Sample marked D is Russian hemp.
Sample marked E is Jute.
Sample marked F is Sisal.

Russian, American, and Bombay hemps resemble each other very much. It is difficult to distinguish them; but I can distinguish Bombay from Russian hemp, by the fibre and smell. Bom-

bay hemp is usually made into tarred cordage; some of it i
20 made into white rope. Russian, Italian, American, and Bombay hemp are all known and styled as hemp, and we purchase them all by that name; and they are used as hemp, and we manufacture them into cordage.

Four several samples of rope were here produced and shown to the witness, who identified them as follows:

Sample marked AA is tarred rope, made here, as witness should judge, of Russian hemp.

Sample marked BB is American rope, made of Bombay hemp.

Sample marked CC is rope manufactured from Russian
21 hemp.

Sample marked DD is American rope, manufactured from American dew-rotted hemp.

On being cross-examined by the counsel for the defendant, the witness testified that he usually makes cordage for the standing rigging of vessels from Russian and American hemp; the latter is now most used; but has made it for several years of Bombay and Italian. Bombay hemp, taken as a whole, is inferior in strength; but selections from it are often very good. Russian hemp is gene-
rally superior to the other hemps for cordage for ships' use,
22 to all other hemps; but for many purposes of domestic use it is no better than Bombay hemp.

The witness was then asked by the counsel for the defendant, "Are the hemps of Russia, Italy and America, the products of one and the same plant, the cannabis sativa, or common hemp plant?" To the relevancy and admissibility of which question the counsel for the plaintiff then and there objected; and his honor, the presiding judge, decided that the botanical origin of the hemp of
Russia was not a proper subject of inquiry on this trial,
23 and that the question proposed was therefore inadmissible, and he therefore allowed the said objection, and refused to permit the said question to be put to the witness; but the said judge ruled and decided that the counsel for the defendant might show any differences between the various kinds of hemp, produced and referred to, as known in trade and commerce; to which decision of the said judge in refusing to permit the said question to be put, the counsel for the defendant did then and there except.

24 The cross-examination of the witness being resumed, the said witness testified that, in the part of the country where he lives, Bombay hemp is not so much used as here. The proportion so used, compared with Russian, is small; he has not himself used any the eight or nine years past. He then bought twenty or thirty tons; and in the course of his business, first and last, he may have used one hundred tons. Witness uses annually from seventy to eighty tons of Russian hemp, and from one hundred and fifty to two hundred tons of American hemp. We also use

Manilla hemp, about one hundred tons per annum. The
25 present prices of the different kinds of hemp are as follows: Manilla hemp about $257 per ton; American from $180 to $230 per ton; Russian from $240 to $250 per ton. Witness does not import Manilla hemp; buys of importers. These several kinds of hemp are all known by distinct names—that is, they are called Indian hemp, Bombay hemp, and Sunn hemp. The are all known in commerce as "hemps." If witness wanted Russian
26 hemp he would give orders for it by that name; would order Indian hemps by their name, as Bombay, Sunn, &c., just as he would order red or white potatoes. Bolt-rope is made generally from the best kinds of hemp in a superior manner; extra pains are taken in manufacturing it. It is much used in commerce in fitting ships. It is generally imported ready made from Russia.

George J. Weaver, a witness on the part of the plaintiff, testified that he lives in Philadelphia; is a rope maker and ship chandler; has been such all his life; twenty odd years in the bu-
27 siness. Being shown the several samples marked from A to F, he says all these articles are known in trade and commerce as hemp; can distinguish them; sample B is Bombay; sample C is Italian; sample D is Russian. These hemps are put to all purposes; used for cordage and bale-rope. Witness has not bought Bombay hemp for the last eight years. From August 31, 1833, to December, 1841, purchased 355 tons of Bombay hemp; the largest portion was put into bale-rope; residue into tarred rope, white rope and bed-cords. We now use American hemp instead
28 of Bombay; the finer qualities of American are used for cordage; other qualities for bale-rope. Russian hemp is made principally into tarred cordage and white rope, and the tow of it into bale-rope and spun-yarn. Prior to August 31, 1833, can't say whether Bombay hemp was known in this country. Witness has dealt in Manilla hemp extensively within the last few years; uses it for running rigging; some for railroad ropes. It comes lower, and is quite as durable as Russian hemp. At this time Manilla is rather higher than Russian; Russian is about $240; Manilla about 12 c. per lb., or $268 80 per ton; American
29 ranges from $185 to $230 per ton; there is little now in market. Russian hemp and Manilla hemp serve the same purpose; they are both used to make standing and running rigging. Some of the pilot-boats on the Delaware have standing rigging of Manilla. Russian hemp is used for railroad ropes. Italian is also used for railroad ropes. The price of Italian hemp is from $215 to $230 per ton.

On his cross-examination, the witness said he makes but little bolt-rope; bale-rope is inferior to bolt-rope, which is made of
30 Russian hemp, principally; Manilla hemp is now considera-

bly used for bolt-rope. All have their distinctive names. The Indian hemps are known by distinct names from Russian, as Manilla hemp, Bombay hemp, &c.; in ordering Indian hemps witness would name the kind wanted, as Manilla, &c.

Francis Burritt, of this city, a witness produced on the part of the plaintiff, testified that he is a merchant, and has been for thirty years; is conversant with the hemp trade, knows all kinds of hemp that come here—Russian, Manilla, Italian, Bombay, Sunn, Jute, Sisal—Manilla, Bombay, Italian and Russian, all these
31 hemps are, I think, generally sold to the same purchasers; that is, every manufacturer of rope uses more or less of all kinds; they are called and known in trade and commerce as hemps; witness deals in hemps of all kinds, and sells to customers who use of all kinds, and has received and sold nearly all kinds. Some hemps are better than others. There is a decided difference in the Bombay and Russian hemps; the Bombay is coarser and harsher, and does not make such good rope as the Russian; it is worth, generally, about two-thirds the price of the Russian; Manilla
32 is also different from Russian; its fibre is different; it is white, and has a long and harsh fibre. It does not take tar. It is generally used for running rigging, lines, cords. There is Russian rope and Manilla rope; one made of Russian hemp, and the other of Manilla hemp, and each suitable for different purposes; they may all be applied to the same purposes, but some are more suitable to certain purposes than others.

On his cross-examination he testified that Russian hemp is used, almost exclusively, for the better kinds of cordage, as stand-
33 ing rigging, bolt-rope, &c. Indian hemps are known in trade and commerce as distinct from Russian; the name designates the character; this is as well settled as in the case of any other article; the difference in fibre of the Manilla and Bombay hemps, as compared with Russian, enters into the quality of the ropes; Russian ropes are most durable and useful; Manilla might be as strong, when new; a general inquiry for hemp would not define any one kind; if asked for "hemp," generally, I would ask which hemp the purchaser wanted.

And hereupon the counsel for the plaintiff rested the case,
34 on his part.

The counsel for the plaintiff, pursuant to an agreement for that purpose, made between the counsel for the respective parties, then admitted that all the hemps of India are the products, not of the cannabis sativa, the ordinary hemp plants of Russia and the United States, but of other and different plants and trees; and thereupon the counsel for the defendant rested the case on his part.

The counsel for the defendant then prayed the court to decide the law of the case, and to instruct and charge the jury as follows:

First. That the present action (being an action of assumpsit, founded on an implied promise to repay a part of the moneys exacted for duties on the hemp in question, by the defendant in his official character as collector) cannot be maintained, inasmuch as by the second section of the general appropriation act of the 3d of March, 1839, which was in force at the time of the receipt of said moneys by the defendant, he was required to pay and did pay such moneys into the Treasury of the United States, and that the act of Congress of the 26th of February, 1845,
36 cannot operate, nor should it be construed to operate retroactively, to subject said defendant in his individual capacity to such action.

Secondly. That the present action cannot be maintained against the defendant, inasmuch as he acted in precise conformity to the tariff act of August 30th, 1842, by which a duty was laid on all unmanufactured hemps (except the hemps of India) of forty dollars per ton; that as between the defendant as collector, and the plaintiff as importer of said hemp, the amount of duties to be
37 paid on the importation thereof was conclusively fixed by the said act of Congress; that the question whether or not the discrimination made by the said act of August 30th, 1842, between the hemps of India and other unmanufactured hemp, was in respect to Russian hemp, repugnant to and an infraction of the treaty previously made with Russia, was exclusively a question to be discussed and settled by and between the government of Russia and the government of the United States; and that in a private action between the importer and the defendant, it was not competent for the plaintiff to raise, nor for the judicial tribunals
38 to decide any such question.

Thirdly. That the present action could not be maintained, because the protest of the plaintiff, dated September 1st, 1842, did not refer to the treaty with Russia, nor set forth distinctly and specifically any ground of objection to the payment of the moneys, or any part thereof, charged by the defendant for duties on the hemp in question; nor did it discriminate between the duties so charged on such hemp and the duties charged on the iron included in the entry, to which said protest was attached; but, on the contrary, the said protest referred to all the duties charged in
30 the said entry—those charged on the iron equally with those charged on the hemp, and placed the objection to the payment thereof on the ground that there was no law authorizing their exaction.

Fourthly. That upon the true construction of the tariff act of the 30th of August, 1842, all hemps wherever produced, and even though produced in India, which are the product of the cannabis sativa, are charged with a duty of forty dollars per ton, and the lesser duty of twenty-five dollars per ton is limited to hemps not the
40 products of the cannabis sativa, but of other and different plants or trees; and that therefore the discrimination made

in favor of such hemps of India was not an infraction of the treaty with Russia of the $\frac{6}{18}$ of December, 1832.

But his honor, the presiding judge, refused so to decide the law of the case, or so to instruct the jury; and on the contrary did then and there decide, that the said action, though an action of assumpsit for the recovery of moneys received by the defendant for duties paid under protest, while the aforesaid act of the 3d
41 of March, 1839, was in force, and before the passage of the act of the 26th of February might be maintained; that the question, whether or not the provision of the tariff act of August 30th, 1842, laying a duty of forty dollars per ton on unmanufactured hemp, was, so far as regarded the hemp of Russia, an infraction of the treaty with Russia, then in force, might be raised and was to be decided in this action; that the protest in writing of the said plaintiff was sufficiently precise and distinct to enable the said plaintiff to recover back any portion of the moneys paid
42 for duties on the hemp included in the entry to which said protest was attached, which should appear to have been illegally exacted; and that in the view taken by the court of the ac of Congress of the 30th of August, 1842, and of the treaty pre viously made, and then in force, between the United States anc Russia, the hemps of Russia were entitled, by force of the saic treaty, to be admitted to entry in the ports of the United State on payment of duties at the rate of twenty-five dollars per ton provided the jury should find from the evidence that th
43 several hemps of India, specified in the act of Congress and referred to in the testimony, were generally known ir trade and commerce, at the time of the passage of said act of Con gress, as unmanufactured hemp; and the said judge did then anc there charge and instruct the jury, that if they should find fron the evidence that said hemps of India were, at the passage of saic act, generally known in trade and commerce as unmanufacturec hemp, it would then be their duty to find their verdict for th plaintiff for the amount of moneys paid by said plaintiff tc
44 defendant for duties on the hemp in question, exceeding twenty-five dollars per ton, which excess, as agreed by th parties, amounted to $965 77, together with interest thereon fron the time of payment, also agreed to be $449 86, making in the whole $1,415 63.

And thereupon the said defendant, by his counsel aforesaid, ther and there excepted to the whole of the said decision, charge, and instruction of the said judge, and also to the aforesaid refusal o the said judge to charge and instruct the jury in conformity
45 with the prayers of the counsel of the said defendant hereinbefore contained. And the said defendant, by his said counsel, did also then and there except to the ruling and decision

First. That the present action (being an action of assumpsit, founded on an implied promise to repay a part of the moneys exacted for duties on the hemp in question, by the defendant in his official character as collector) cannot be maintained, inasmuch as by the second section of the general appropriation act of the 3d of March, 1839, which was in force at the time of the receipt of said moneys by the defendant, he was required to pay and did pay such moneys into the Treasury of the United States, and that the act of Congress of the 26th of February, 1845, cannot operate, nor should it be construed to operate retroactively, to subject said defendant in his individual capacity to such action.

Secondly. That the present action cannot be maintained against the defendant, inasmuch as he acted in precise conformity to the tariff act of August 30th, 1842, by which a duty was laid on all unmanufactured hemps (except the hemps of India) of forty dollars per ton; that as between the defendant as collector, and the plaintiff as importer of said hemp, the amount of duties to be paid on the importation thereof was conclusively fixed by the said act of Congress; that the question whether or not the discrimination made by the said act of August 30th, 1842, between the hemps of India and other unmanufactured hemp, was in respect to Russian hemp, repugnant to and an infraction of the treaty previously made with Russia, was exclusively a question to be discussed and settled by and between the government of Russia and the government of the United States; and that in a private action between the importer and the defendant, it was not competent for the plaintiff to raise, nor for the judicial tribunals to decide any such question.

Thirdly. That the present action could not be maintained, because the protest of the plaintiff, dated September 1st, 1842, did not refer to the treaty with Russia, nor set forth distinctly and specifically any ground of objection to the payment of the moneys, or any part thereof, charged by the defendant for duties on the hemp in question; nor did it discriminate between the duties so charged on such hemp and the duties charged on the iron included in the entry, to which said protest was attached; but, on the contrary, the said protest referred to all the duties charged in the said entry—those charged on the iron equally with those charged on the hemp, and placed the objection to the payment thereof on the ground that there was no law authorizing their exaction.

Fourthly. That upon the true construction of the tariff act of the 30th of August, 1842, all hemps wherever produced, and even though produced in India, which are the product of the cannabis sativa, are charged with a duty of forty dollars per ton, and the lesser duty of twenty-five dollars per ton is limited to hemps not the products of the cannabis sativa, but of other and different plants or trees; and that therefore the discrimination made

in favor of such hemps of India was not an infraction of the treaty with Russia of the $\frac{6}{18}$ of December, 1832.

But his honor, the presiding judge, refused so to decide the law of the case, or so to instruct the jury; and on the contrary did then and there decide, that the said action, though an action of assumpsit for the recovery of moneys received by the defendant for
duties paid under protest, while the aforesaid act of the 3d
41 of March, 1839, was in force, and before the passage of the
act of the 26th of February might be maintained; that the question, whether or not the provision of the tariff act of August 30th, 1842, laying a duty of forty dollars per ton on unmanufactured hemp, was, so far as regarded the hemp of Russia, an infraction of the treaty with Russia, then in force, might be raised and was to be decided in this action; that the protest in writing of the said plaintiff was sufficiently precise and distinct to enable the
said plaintiff to recover back any portion of the moneys paid
42 for duties on the hemp included in the entry to which said
protest was attached, which should appear to have been illegally exacted; and that in the view taken by the court of the act of Congress of the 30th of August, 1842, and of the treaty previously made, and then in force, between the United States and Russia, the hemps of Russia were entitled, by force of the said treaty, to be admitted to entry in the ports of the United States on payment of duties at the rate of twenty-five dollars per ton,
provided the jury should find from the evidence that the
43 several hemps of India, specified in the act of Congress,
and referred to in the testimony, were generally known in trade and commerce, at the time of the passage of said act of Congress, as unmanufactured hemp; and the said judge did then and there charge and instruct the jury, that if they should find from the evidence that said hemps of India were, at the passage of said act, generally known in trade and commerce as unmanufactured hemp, it would then be their duty to find their verdict for the
plaintiff for the amount of moneys paid by said plaintiff to
44 defendant for duties on the hemp in question, exceeding
twenty-five dollars per ton, which excess, as agreed by the parties, amounted to $965 77, together with interest thereon from the time of payment, also agreed to be $449 86, making in the whole $1,415 63.

And thereupon the said defendant, by his counsel aforesaid, then and there excepted to the whole of the said decision, charge, and instruction of the said judge, and also to the aforesaid refusal of
the said judge to charge and instruct the jury in conformity
45 with the prayers of the counsel of the said defendant here-
inbefore contained. And the said defendant, by his said counsel, did also then and there except to the ruling and decision

of the said judge in refusing to permit the question hereinbefore mentioned to be put to the witness, Stephen Whittemore, junior.

And the jurors of the jury aforesaid thereupon found their verdict for the plaintiff for the sum of fourteen hundred and fifteen dollars and sixty-three cents. And because the said questions, so as aforesaid proposed on the part of the said defendant, and
46 objected to by the said plaintiff, and excluded by the said presiding judge, and the prayers of the said defendant, and the several decisions, instructions, and charge of the said presiding judge, and the said exceptions taken to the same, do not appear by the record of the verdict aforesaid, the defendant has caused the same to be written on this bill of exceptions, to be annexed to such record, and has prayed the said judge to set his hand and seal to the same.

Whereupon the said Samuel Nelson, the said presiding judge, before whom the said issue was tried, and the said exceptions were taken, has hereto set his hand and seal, this
47 twenty-ninth day of May, in the year of our Lord one thousand eight hundred and forty-nine.

S. Nelson

1861 Jan 16th Record printed.

Subsequently Judge Nelson signed the Bill of Exceptions.